Supreme Court, U.S.
FILED
DEC 15 1992
OFFICE OF THE CLERK

No. 92-1101

In The

Supreme Court of the United States

October Term, 1992

ROBERT RICHARDSON KIMBALL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD B. MAZER
LAW OFFICES OF
RICHARD B. MAZER
632 Commercial Street
Third Floor
San Francisco, CA 94111
Telephone: (415) 781-1800

Attorney for Petitioner
Robert Richardson Kimball

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

IS DUE PROCESS VIOLATED WHEN A DISTRICT COURT JUDGE RELIES EXCLUSIVELY ON GOVERNMENT INVESTIGATIVE REPORTS WHICH THE RECORD DOES NOT ESTABLISH THE COURT RECEIVED AND REVIEWED IN SETTLING FACTUAL DISPUTES IN A PRESENTENCE INVESTIGATIVE REPORT UNDER RULE 32(c)(3)(D) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE?

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 2

Statutory Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Writ 7

The Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court 7

Conclusion 10

Appendix ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Massiah v. United States, 311 U.S. 201 (1964) 3

United States v. Fernandez-Angula, 897 F.2d 1514, 1516 (9th Cir. 1990) 8

United States v. Kerr, 876 F.2d 1440, 1445 (9th Cir. 1989) 9

United States v. Kimball, 884 F.2d 1274 (9th Cir. 1989) 3

United States v. Kimball, 975 F.2d 563 (9th Cir. 1992) 1

United States v. Petitto, 767 F.2d 607, 609 (9th Cir. 1985) 8

United States v. Rachels, 820 F.2d 325, 327 (9th Cir. 1987) 9

CONSTITUTION

United States Constitution, Fifth Amendment 2

RULE

Federal Rules of Criminal Procedure, Rule 32(c)(3)(D) 2, 7, 8, 9

STATUTES

18 U.S.C. § 2 ..... 2, 3

18 U.S.C. § 371 2

18 U.S.C. § 1952(a)(3) 3

18 U.S.C. § 1956(a)(1) 2

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 1956(a)(2) 2

18 U.S.C. § 1956(a)(2)(B)(i) 3

18 U.S.C. § 5324(1) 3

21 U.S.C. § 841(a)(1) 3

28 U.S.C. § 1254(1) 2

No. _____

In The

Supreme Court of the United States

October Term, 1992

ROBERT RICHARDSON KIMBALL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Robert Richardson Kimball, the petitioner in the above-captioned case, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered on September 17, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on September 17, 1992 and is reported *sub. nom. United States v. Kimball,* 975 F.2d 563

(9th Cir. 1992). A copy said opinion appears herein as Appendix "A".

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Fifth Amendment; and

2. Federal Rules of Criminal Procedure, Rule 32(c)(3)(D).

The relevant statutory provisions are set forth in Appendix "B" of this Petition.

STATEMENT OF THE CASE

An indictment was returned against Petitioner and five others on November 18, 1987, in the District of Nevada, Reno Division.

Petitioner was charged with conspiracy to defraud the United States, launder money, and evade financial reporting requirements [in violation of 18 U.S.C. § 371]; aiding and abetting money laundering [in violation of 18 U.S.C. §§ 2, 1956(a)(1)]; aiding and abetting international money laundering [in violation of 18 U.S.C. §§ 2, 1956(a)(2)]; attempted evasion of financial reporting

requirements, and aiding and abetting the same [in violation of 18 U.S.C. § 2, and 31 U.S.C. § 5324(1)]; and aiding and abetting interstate travel to promote racketeering [in violation of 18 U.S.C. §§ 2, 1952(a)(3)].

A Superseding Indictment was returned on September 13, 1988. The Superseding Indictment added two defendants and additionally charged a conspiracy to aid and abet the distribution of marijuana [in violation of 18 U.S.C. § 2, and 21 U.S.C. § 841(a)(1)].

Intense pretrial litigation consumed some two years in the district court. One aspect of this litigation, involving the government's misconduct in violation of Petitioner's rights under *Massiah v. United States*, 311 U.S. 201 (1964), was decided by the United States Court of Appeals for the Ninth Circuit on interlocutory appeal by the government in *United States v. Kimball*, 884 F.2d 1274 (9th Cir. 1989).

On January 13, 1990 a Superseding Information was filed by the government. This information charged Petitioner with aiding and abetting an international money laundering offense [18 U.S.C. §§ 2, 1956(a)(2)(B)(i)]. On that same day, Petitioner pled guilty to the offense alleged in the Superseding Information. A detailed written Joint Plea Agreement was entered into by the defendants at the time of the plea. One condition of this Plea Agreement was that the defendants forfeit not less than Seven Million Dollars ($7,000,000) in cash. Petitioner's maximum exposure under this Plea Agreement was thirteen (13) years in prison.

On January 25, 1991, a Supplemental Plea Agreement was filed. This Plea Agreement no longer required the

defendants to jointly forfeit not less than Seven Million Dollars ($7,000,000) in cash; as a result, however, Petitioner's maximum exposure was raised from thirteen (13) years to eighteen (18) years in prison.

On March 20, 1991, prior to Petitioner's sentencing hearing, Petitioner filed written objections to the presentence investigation report. In this motion Petitioner listed thirty-two (32) specific statements in the presentence investigation report which were either false or misleading. A large part of Petitioner's objections to the presentence investigation report focused on the section of the report detailing the "prosecution version" of the offense. This six-page section of the presentence investigation report detailed Petitioner's role in the plan to launder money in Reno. This portion of the report also alleged that Petitioner was involved in the drug-trafficking that produced the money.

Petitioner's objections to the presentence investigation report can be placed in two categories. First, objections to allegations that Petitioner participated in drug smuggling. The facts surrounding this contention were the subject of an evidentiary hearing. The hearing became part of the record in the aforementioned interlocutory appeal before the government. The second category of objections were to factual assertions in the presentence report concerning events which occurred prior to November, 1987 which were not the subject of any evidentiary hearing. Ten of the twenty-one objections made by Petitioner fall into the second category of objections.

On April 8, 1991,[1] the government filed a written response to Petitioner's objections to the presentence report. In addressing Petitioner's claims of inaccuracies, the government cited exclusively to factual assertions made in the DEA investigative reports which had been provided to defense counsel as discovery. There is no evidence in the record that the trial court received and/or reviewed these investigative reports.

During the hearing, defense counsel raised a number of important issues including Petitioner's harsh pretrial detention and the necessity for sentencing parity. The court then raised the issue of Petitioner's challenges to the presentence investigation report. The court asked:

> What is the law in the Ninth Circuit with respect to these presentence reports and what specific findings the court must make with respect to the prosecutor's statement?

The court then answered its own question:

---

[1] Petitioner's sentencing hearing had begun on March 25, 1991. At that time the government had not filed any written response to petitioner's objections to the presentence investigation report. Instead the government argued at that hearing that there were no inaccuracies in the PSI, and that it "could prove these things." The government indicated that it had taken all of the factual statements in the presentence investigation report "out of our reports." In response, the sentencing court indicated that it would set "a complete day of evidentiary hearing."

On April 8, 1991 at 4:10 p.m., petitioner sentencing hearing resumed. The court began the hearing by informing defense counsel that he had "until 5:00 p.m." (or less than one hour) to complete the defense portion of the sentencing hearing. This was obviously different than the court's prior promise of "a complete day of evidentiary hearing."

> I think its incumbent as long as you wish to have a prosecutor's statement in this [presentence investigation] report, you could withdraw it if you want to, but if you wish to have it in the report then I think the court would have to be satisfied that it's accurate at least with respect to the fact that the prosecution feels they could show that type of evidence to the court if we conducted a full hearing here.

In response to the court's statement, the government referred again to "certain [DEA-6] reports" which could "be verified in the government's discovery." The government then rested its position on the written response it had filed.

Thereafter, the court addressed each of Petitioner's challenges to statements in the presentence report and either granted or denied Petitioner's motion to have those statements stricken from the report. The court then proceeded to sentence Petitioner to eighteen years in prison (the maximum sentence permitted under the plea agreement). In so doing, the court expressly relied upon portions of the presentence report which were challenged by Petitioner, and for which the only support in the record were the investigative reports.

REASONS FOR GRANTING THE WRIT

The Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court

This case presents an opportunity to decide an issue important to the administration of criminal justice which has not been settled by this Court. Concisely stated, the issue may be phrased as follows: Is Due Process violated when a district court judge relies exclusively on government investigative reports which the record does not establish the court received and/or reviewed to settle factual disputes in a presentence investigative report under Rule 32(c)(3)(D) of the Federal Rules of Criminal Procedure?

An overwhelming percentage of federal criminal cases are decided without a trial on a plea of guilty. The presentence investigation report is the principal source of information regarding the offense and the offender available to the sentencing court. Rule 32(c)(3)(D) is an attempt to ensure that the defendant's Fifth Amendment right to be sentenced using only accurate information is not violated. Rule 32(c)(3)(D) provides:

> If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determination shall

> be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons.

This portion of Rule 32 was added in 1983 in order "to ensure that record is made as to exactly what resolution occurred as to a controverted matter" in the presentence report. *United States v. Petitto*, 767 F.2d 607, 609 (9th Cir. 1985). The *Petitto* court noted that "inaccurate statements in the presentence investigation report may affect the defendant's sentence, the conditions of his confinement, and the date and terms of his parole." *Id.*, at 610-611. Strict compliance with Rule 32 is required. As held in *United States v. Fernandez-Angula*, 897 F.2d 1514, 1516 (9th Cir. 1990) (*en banc*):

> We have consistently and frequently stated that when the district court failed to make the required Rule 32 findings or determinations at the time of sentencing, we must vacate the sentence and remand for resentencing. We approve of those cases and hold that when the defendant challenges the factual accuracy of any matters contained in the presentence report, the district court must, at the time of sentencing, make the findings or determinations required by Rule 32. If the district court fails to make the required findings or determinations, the sentence must be vacated and the defendant resentenced.

In short, it is beyond dispute that a sentencing court faced with controverted matters in a presentence report must either "(a) make a factual finding concerning the controverted information *or* (b) make a determination

that such a finding is not required because the controverted matters will not be considered in sentencing." *United States v. Kerr*, 876 F.2d 1440, 1445 (9th Cir. 1989).

In the instant case, the district court elected to make findings concerning controverted matters raised by Petitioner. In making a number of these findings, the court relied exclusively upon the government's representations that the information was accurate because it came from the government's investigative reports in the case.[2] There is no evidence, however, that the district court judge received and/or reviewed the investigative reports before making his Rule 32 findings.

Due Process surely requires the record to establish the court reviewed the material upon which it purports to rely in settling factual disputes in the presentence investigation report. "Rule 32(c)(3)(D) helps to implement the due process requirement that judges determine sentences only on the basis of accurate information." *United States v. Rachels*, 820 F.2d 325, 327 (9th Cir. 1987). Without such an assurance, the findings of a trial court may not stand.

In the instant case, the record does not establish that the sentencing court received and/or reviewed the investigative reports before ruling on Petitioner's objections to factual inaccuracies in the presentence investigation report. Assuming, *arguendo*, the trial court would be justified in relying solely upon such information in ruling

---

[2] For example, Petitioner objected to the following sentence in the presentence investigation report: "On 8/28/87, Boese, utilizing the name Duncan Greene, attempted to wire $9,350 to Robert Bland [Petitioner's alias] in Hong Kong." The trial court stated that "[t]here is support in the record for that."

when controverted matters, Due Process requires the record to establish the sentencing court in fact received and reviewed the investigative reports prior to ruling on a defendant's objections.

CONCLUSION

For the foregoing reasons, the instant Petition for a Writ of Certiorari should be granted.

Dated: December 15, 1992

Respectfully submitted,

RICHARD B. MAZER
LAW OFFICES OF
RICHARD B. MAZER
632 Commercial Street
Third Floor
San Francisco, CA 94111
Telephone: (415) 781-1800

Attorney for Petitioner
Robert Richardson Kimball

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ROBERT RICHARDSON KIMBALL, *Defendant-Appellant.*	No. 91-10207 D.C. No. CR-87-00055-HDM ORDER AND OPINION

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding

Argued and Submitted
March 10, 1992 – San Francisco, California

Opinion Filed April 27, 1992
Opinion Withdrawn: September 17, 1992
Filed September 17, 1992

Before: Stephen Reinhardt, John T. Noonan, Jr. and David R. Thompson, Circuit Judges.

Opinion by Judge Noonan

SUMMARY

Criminal Law and Procedure/Sentencing/Individual Rights/Constitutional Rights

Affirming a district court judgment of sentence, the court of appeals held that the district court did not abuse

its discretion in sentencing appellant to the pre-Guidelines term specified in the presentence report for his participation in a conspiracy to smuggle a large quantity of marijuana into the United States.

Appellant Robert Richardson Kimball pled guilty to the crime of aiding and abetting international money laundering under a plea agreement. At the pre-Guidelines sentencing hearing, the district court took into account that Kimball had also engaged in marijuana smuggling, as reported in the presentence report. In establishing a factual basis for his plea, the district court did not require Kimball to admit to any facts supporting the government's claim that he had smuggled marijuana. Kimball admitted only his role as a money launderer. However, the prosecution reminded the court in the course of an evidentiary hearing that it had heard earlier evidence in the case in the course of a hearing on the disqualification of Kimball's counsel because of his apparent involvement in the marijuana smuggling. The district court sentenced Kimball to the maximum possible term under the plea agreement.

Kimball could not appeal the sentence imposed in this pre-Guidelines case. Thus, his only ground for appeal was the sentencing court's alleged abuse of discretion in resolving the uncontroverted matters in the presentence report. In seeking to rebut the evidence presented by the government of his marijuana smuggling, Kimball simply alleged that the testimony was false. However, having failed to show that the disputed fact was false or unreliable, Kimball's due process and rule 32(c)(3)(D) challenges to the substance of his presentence report failed.

The court rejected Kimball's argument that his due process rights were violated because he had no "prior notice" that the court would invoke, at his sentencing, the evidence presented in its previous evidentiary hearings. There is no general right to an evidentiary hearing at sentencing, and where a defendant fails to present any facts in rebuttal to the government's evidence, there need be no new evidentiary hearing. Kimball's case was unusual because the evidentiary hearing at which testimony was introduced against Kimball was centrally concerned with the disqualification of Kimball's attorney. However, Kimball could not have been surprised by the existence of that testimony. The evidence was presented in Kimball's own case. Kimball was on notice that the fact of his marijuana smuggling was at issue during his sentencing and, by his own admission, Kimball knew of the testimony accusing him of that activity.

Kimball also argued that he was prejudiced by his inability to effectively confront the witnesses against him. At hearings concerned with disqualifying his lawyer, however, Kimball had no compelling motive to cross-examine witnesses who were stating and implying that he was a marijuana smuggler. While his mind was on other things, due process is not offended at sentencing by the use of sworn testimony given in open court and liable to cross-examination. The evidence that Kimball was involved in smuggling marijuana was reliable; Kimball knew of that evidence and had the opportunity to rebut it. At sentencing, the Due Process Clause requires no more.

COUNSEL

David Nickerson, Mazer & Nickerson, San Francisco, California, for the defendant-appellant.

Brian L. Sullivan, Assistant United States Attorney, Reno, Nevada, for the plaintiff-appellee.

ORDER

The panel has voted unanimously to grant the petition for rehearing. The petition for rehearing is GRANTED and the opinion filed April 27, 1992 is WITHDRAWN.

OPINION

NOONAN, Circuit Judge:

Once more the sentencing procedure, not the crime, is the issue on appeal. On January 13, 1990 Robert Richardson Kimball pleaded guilty to the crime of aiding and abetting international money laundering in violation of 18 U.S.C. § 1956(a)(2)(B)(i) and § 2. The district court in sentencing took into account that he had also engaged in marijuana smuggling. Kimball objects to the process the district court employed. We affirm the district court.

PROCEEDINGS

In November 1987 Kimball was charged with conspiracy to defraud the United States and with a variety of other crimes relating to money laundering and reporting

financial requirements. In September 1988 a superseding indictment charged Kimball and the others plus two more defendants with conspiracy to aid and abet the distribution of marijuana.

Plea negotiations were conducted with Kimball and five of the defendants, resulting in the Joint Plea Memorandum of January 13, 1990, made pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure and as such intended to be binding on the court. The relevant terms of this agreement were that the defendants would forfeit certain property including $7 million in cash and an additional "$5,632 in cash that was seized from defendant Kimball." The acceptance of these assets by the government was "based on defendants' representation that they represent all defendants' forfeitable assets, assets obtained through drug trafficking." In addition, the defendants agreed to the forfeiture of approximately $7,618,570 obtained by "Robert Richardson Kimball, Brian Peter Daniels, David Lyle Boese, Stephen Illenberger, Thomas E. Tuttle". The defendants agreed to plead guilty to one count of money laundering in violation of 18 U.S.C. § 1596 and the government agreed they would be sentenced under pre-guideline procedures with the binding cap of 13 years for Kimball.

A further section of the Joint Plea Memorandum stated "Facts to Support a Plea of Guilty." Relevant facts therein stated follow:

> In approximately late 1986, Brian Peter Daniels, Robert Richardson Kimball, David Lee Boese, Thomas E. Tuttle and others began formulating plans to import loads of southeast Asian marijuana in to the United States. Brian

Peter Daniels, who resided in Thailand, had established contacts to obtain Thai marijuana from sources who cultivated and stockpiled the marijuana.

In late 1986, and continuing through July 1987, Boese, utilizing the name Barry John Johnson, and utilizing a British passport, travelled on numerous occasions to Hong Kong and Bangkok and other cities throughout southeast Asia in order to arrange for the shipments. Robert Richardson Kimball, utilizing the name Robert Glyn Bland, and also utilizing a British passport, was also travelling throughout southeast Asia during the same time period. During this time Boese and Kimball were in communication concerning the upcoming loads.

. . . .

Some time around the middle of September, 1987, the 42-ton load of marijuana was offloaded on the West Coast of the United States. Approximately 19 tons of this marijuana was transported and distributed on behalf of the Daniels, Kimball, Boese Organization.

. . . .

On January 26, 1988, Brian Peter Daniels met with Phillip Christensen in Bangkok, Thailand. During this meeting, Daniels related that he had sent four successful boatloads of marijuana to the United States in 1987. The last boatload was split with William and Chris Schaffer. Daniels related that the funds derived from this load were seized in Reno, Nevada and two of his (Daniels') men, Robert Kimball and Stephen Illenberger, were arrested. Daniels stated that he

> was paying money to assist Kimball and Illenberger with their legal problems. Daniels stated that he had flown to Austria to open up a bank account in order to receive a portion of the $7.6 million seized in Reno. Daniels also related that Kimball and his associates had a total of approximately $45,000,000 as a result of the above load.

The same day that the Joint Plea Memorandum was agreed to, the government filed a superseding information charging Kimball with aiding and abetting an international money laundering offense, and Kimball pleaded guilty to the charge.

On January 25, 1991 a Supplemental Plea Agreement was entered into by the government and the defendants including Kimball. According to this agreement, the defendants were no longer required to forfeit $7 million in cash. However, the cap on Kimball's sentence was increased from 13 years to 18 years and he agreed "to forfeit to the government before sentencing at least $700,000 in cash that was derived from drug trafficking." At the time the district court accepted Kimball's guilty plea, Kimball effectively repudiated the facts as presented in the Joint Plea Memorandum. In establishing a factual basis for his plea, the court did not require Kimball to admit to any facts supporting the government's claim that he had smuggled marijuana. Kimball admitted only his role as a money launderer.

An amended presentence report relating to Kimball was filed by a probation officer March 1, 1991. It gave both a "prosecution version" and a "defendant's version." According to the defendant's version, Kimball admitted only participation in attempting to transfer

money that he believed to come from the sale of marijuana. In contrast, the "prosecution version" essentially tracked the Joint Plea Memorandum. Thus it began with the paragraphs quoted earlier in this opinion that stated that Kimball had begun in late 1986 to conspire with the other defendants to import loads of marijuana into the United States.

On March 19, 1991 Kimball filed objections to the presentence report. In particular, he objected to the statements about his participation in the smuggling of marijuana. He contended that his sole activity was to "receive money from sources that have been involved in an importation and distribution of marijuana." The statement that beginning in 1986 he and the others had begun formulating plans to import Asian marijuana into the United States was characterized as "totally unfounded by any evidence or facts." Comparable objections were made to other parts of the presentence report.

Kimball's sentencing hearing began on March 25, 1991. In light of the objections, the court said it would set an evidentiary hearing. On April 8, 1991 the government filed a written response to the objections. It referred to reports of government agents to support its contentions. At the evidentiary hearing that followed, the government reminded the court that it had heard earlier evidence in the case in the course of a hearing on the disqualification of Kimball's counsel because of his apparent involvement in the marijuana smuggling. The government read from its statement of facts in its brief before the Ninth Circuit in *United States v. Kimball,* 884 F.2d 1274 (9th Cir. 1989), a case which upheld the suppression of certain statements made by Kimball.

The district court declared, "I have heard enough about this case that I pretty much know what it is all about anyway. . . . You don't live with one for two years or two and a half years like I have, and not have a good understanding of what it is all about." The court further stated to Kimball:

> I, of course, heard the testimony of D.E.A. Agents at prior hearings, their conversations that Daniels satisfied me that you were not just involved in the money laundering end of it, that you also had fairly intimate knowledge of the drug smuggling activities and had some participation in connection wit [sic] those activities as well and I've already made those findings.

The district court then sentenced Kimball to 18 years, the maximum possible under the plea agreement. Kimball appeals.

ANALYSIS

In this pre-guideline case, the defendant cannot appeal the sentence imposed. His only ground for appeal is the court's alleged abuse of discretion in resolving the controverted matters in the presentence report. We are free to affirm on any basis shown in the record.

In making either a due process challenge or a Fed. R. Crim. P. 32(c)(3)(D) challenge to a presentence report, a defendant bears the burden of first showing that "the disputed information is . . . false or unreliable". *United States v. Columbus*, 881 F.2d 785, 787 (9th Cir. 1989) (due process challenge); *United States v. Roberson*, 896 F.2d 388, 391 (9th Cir. 1990) (Rule 32(c)(3)(D) challenge).

Material information is "unreliable" if it "lacks some minimal indicium of reliability beyond mere allegation." *United States v. Ibarra*, 737 F.2d 825, 827 (9th Cir. 1984) (quoting *United States v. Baylin*, 696 F.2d 1030 (3rd Cir. 1982)).

Kimball argues that the factual basis for the government's assertion that he was a marijuana smuggler is "almost nil". The evidence that Kimball was engaged in marijuana smuggling includes the sworn testimony of DEA Agent William Harper; the sworn testimony of two undercover informants; and a note, written by Daniels, purporting to outline the ownership interests in a 42-ton load of marijuana that had been smuggled into the United States. All of this evidence, and quite a bit more that merely implies Kimball was engaged in smuggling marijuana, was presented by the government at evidentiary hearings before Kimball arranged his plea agreement.

According to the testimony of Harper, who met with Daniels a number of times undercover, Daniels told him that Kimball and David Boese were "in charge of the distribution of the load of marijuana that had been sent over to the United States and in a subsequent collection of the money". Daniels then showed the agents "a handwritten sheet breakdown of the 42 tons that [Daniels] had sent over and who owned what portion of that load of marijuana". Harper testified that Daniels told him the ownership interests in the marijuana "was about $19 million for [Daniels]. The breakdown for Mr. Kimball and Mr. Boese I don't remember". Harper's testimony establishes that Kimball was a part owner in the marijuana smuggled into the country. Daniels' note is physical evidence tending to corroborate Harper's testimony.

Harper also testified that in his first meeting with Daniels in Bangkok, Daniels told him that two people with whom he owned shares of a shipment of marijuana had gotten caught in laundering $7 1/2 million, which was the amount initially collected for the shipment; that they were now in jail in Reno; and that Daniels possessed copies of the indictments and complaints. Harper could not remember if Daniels had identified the two people by name or not. Within a month of Harper's conversation with him, however, Daniels separately told two undercover informants that Kimball was his "associate" who had been arrested in Reno.

In seeking to rebut this evidence of his marijuana smuggling, Kimball simply alleges that the testimony is false. These bare allegations do not establish the unreliability of the testimony. *United States v. Rachels*, 820 F.2d 325, 328 (9th Cir. 1987). Kimball offered no evidence to contradict the evidence put on by the government. One cannot allege that "there are mistakes and then stand mute without showing why they are mistakes". *Roberson*, 896 F.2d at 391. Having failed to show that the disputed fact is false or unreliable, Kimball's due process and Rule 32(c)(3)(D) challenges to the substance of his presentence report fail.

Kimball also argues that his due process rights were violated because he had no "prior notice" that the court would invoke, at his sentencing, the evidence presented in its previous evidentiary hearings. This is a curious argument. The mass of evidence accumulated before a conviction is handed down or before a plea is arranged is typically the very stuff used to resolve a factual dispute in a presentence report. There is no general right to an

evidentiary hearing at sentencing, *United States v. Petitto*, 767 F.2d 607, 611 (9th Cir. 1985), and where a defendant "fail[s] to present any facts in rebuttal" to the government's evidence, there need be no new evidentiary hearing. *United States v. Monaco*, 852 F.2d 1143, 1149 (9th Cir. 1988). Kimball's case is unusual, however, because the evidentiary hearings at which Harper and the undercover informants testified was centrally concerned with the disqualification of Kimball's attorney, Jack Hill. The lawyer displaced the client from the court's attention. Kimball seems to be suggesting that the testimony taken when the court considered disqualifying Hill, although officially part of the record in Kimball's case, was unfairly used against him.

Kimball first suggests that he was surprised by the existence of the testimony. This cannot be. The evidence was presented in Kimball's own case. In fact, the court specifically asked Kimball at the time of the hearings whether he had heard all of the evidence presented and he replied that he had. Kimball next suggests that he was surprised by the use of that testimony during his sentencing. But, as in *United States v. Notrangelo*, "the presentence report put [the defendant] on notice that these facts, supported by the sworn testimony of witnesses, were before the court". 909 F.2d 363, 365 (9th Cir. 1990). Kimball was on notice that the fact of his marijuana smuggling was at issue during his sentencing and, by his own admission, Kimball knew of the testimony accusing him of that activity.

Kimball also argues that he was prejudiced by his inability to effectively confront the witnesses against him. At hearings concerned with disqualifying his lawyer,

Kimball had no compelling motive to cross-examine witnesses who were stating and implying that he was a marijuana smuggler. His mind, it seems, was on other things. But due process is not offended at sentencing by the use of sworn testimony given in open court and liable to cross-examination. *Notrangelo,* 909 F.2d at 364-66. It follows that Kimball, who had the opportunity to confront the witnesses against him but failed to employ it, suffered no injury to his right of due process. The evidence that Kimball was involved in smuggling marijuana is reliable; knew of that evidence and had the opportunity to rebut it. At sentencing, the Due Process Clause requires no more.

AFFIRMED.

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

RULE 32(c)(3)(D) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary report or part thereof, the court shall, as to each matter controverted, make (i) a finding s [sic] to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determination shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons.